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Beware of Courts Bearing Gifts: Transparency and the Court of Justice of the European Union

This paper reconsiders the principle of transparency in the European Union (EU) legal order and takes as its focal point the contribution of the EU Courts as regards the presumptions of non-disclosure of EU documents. The aim is to investigate the role played by the judiciary in relation to a twofold question: How open can the Union's decision-making be, and is it possible for citizens to participate in the decision-making process of EU institutions, bodies, offices and agencies? The paper argues that accountability deficits in the field of access to documents have been filled, to an extent, by the EU Courts' imposition of boundaries on the broad derogations to the right. But nevertheless, the paper concludes that the establishment through the case law of general presumptions against openness has fundamentally worsened the standards of accountability. Rather regrettably, although the EU legislature set the default position to the widest access to documents, this has been reversed to non-disclosure by the EU judiciary as regards non-legislative documents.

Keywords: transparency; access to documents; general presumptions, Regulation 1049/2001

Introduction

This paper examines the problematic aspects of the EU's access to documents regime, namely the ambiguously drafted derogations from the right of access to documents and the development of general presumptions of non-disclosure of documents through the case law. In particular, the paper argues that the EU Courts' imposition of boundaries on the derogations to the access right mitigates, to an extent, the problematic aspects of the access rules. Yet, the more recent development (by the same courts) of a set of presumptions against openness has actually worsened the standards of accountability by reversing the default position, specifically in relation to non-legislative documents, from the widest possible access to non-disclosure.

To substantiate this, the paper firstly examines the legislative framework as regards the access to documents rules and outlines the contribution of the EU Courts before the adoption of the EU's Transparency Regulation from the point of view of accountability. Secondly, the paper assesses in detail whether the framework incorporated by the Transparency Regulation,¹ as applied to date, enhances openness in the decision-making process. The paper concludes that, as regards non-legislative documents, the net effect of judicial

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¹ Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

developments in the area of presumptions is to reduce the standards for public accountability that previously applied.

Overview of the legislative background

It is often alleged that the EU's decision-making is insufficiently transparent and that accountability deficits are even growing, something which compromises the Union's overall legitimacy.² The widespread notion that the Union's decision-making process lacked accountability and legitimacy³ was highlighted by the problems that arose during the process of ratification of the Maastricht Treaty.⁴ In consequence, the EU institutions had to consider alternatives that would rectify this public disinterest and would bring the Union closer to the citizens. Access to documents was seen from the early days as a major part of the solution to the Union's legitimacy problems and has been at the core of transparency efforts.⁵

The initial step, which proved to be the cornerstone of the public's fundamental right to information, was a Declaration on transparency attached to the Final Act of the Maastricht Treaty. This provided that transparency enhances the democratic credentials of the institutions and increases the public's confidence in the administration.⁶ It illustrated the political willingness for the establishment of a "right" of access to information and is commonly

² M. Costa, *The Accountability Gap in EU Law* (Oxon: Routledge, 2017); S. Peers and M. Costa "Accountability for Delegated and Implementing Acts after the Treaty of Lisbon" (2012) 18 E.L.J. 427; S. Peers and M. Costa, "Judicial review of EU Acts after the Treaty of Lisbon" (2012) 8 E.C.L. Rev. 82; S. Peers and M. Costa "Reassessing the accountability of EU decentralized agencies: Mind the Independence Gap" 2016 22 E.P.L. 645; H. Cooper, "Where European democracy goes to die", (Politico, 2016); D. Curtin, and P. Leino, "In search of transparency for EU law-making: Trilogues on the cusp of dawn" (2017) 54 C.M.L. Rev. 1673; D. Curtin and P. Hart, *The Real World of EU Accountability, What Deficit?* (Oxford: Oxford University Press, 2010); A. Arnall and D. Wincott (eds), *Accountability and Legitimacy in the EU* (Oxford: Oxford University Press, 2002). See also, P. Birkinshaw, "Freedom of information and openness: Fundamental human rights?" (2006) 58 A.L. Rev. 177.

³ S. Peers, "The New Regulation on Access to Documents: A Critical Analysis" (2002) 21 Y.E.L. 385; I. Osterdahl, "Openness v. Secrecy: Public Access to Documents in Sweden and the European Union" (1998) 23 E.L. Rev. 4, 336.

⁴ The negative response from the Danish electorate and also the very near to the majority of the electorate voting in the referendum in 1992 chose to reject France's ratification of the Maastricht Treaty. There were also challenges to ratification in the UK Parliament and the German Constitutional Court.

⁵ It must be noted here that the majority of the Member States, with the notable exception of Cyprus, have regulated the issue and introduced provisions on public access either at Constitutional or at legislative level. Constitutional provisions exist in Sweden, Spain, the Netherlands, Austria, Portugal, Belgium, and Finland. Legislative provisions regulating access to documents exist in France, Denmark, Portugal, Ireland, Greece, Italy, Germany, the United Kingdom, Luxembourg, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Slovak Republic, Slovenia. A comparative analysis of the Union's public access to documents rules with public access legislation in the Member States reveals that the issue had already been regulated at the national level years before the EU legislation on the issue was introduced. See for example H. Kranenborg and W. Voermans, *Access to Information in the European Union: A Comparative Analysis of EC and Member State Legislation* (Groningen: Europa Law Publishing, 2005).

⁶ Declaration No. 17, Treaty of the European Union, Maastricht, 7 February 1992.

considered as the beginning of a more transparent era in the EU.⁷ In response to the Declaration and with the aim of bringing the Union closer to the citizens, the Commission first surveyed national law on access to documents and then released a communication on the issue.⁸ In the same year the Code of Conduct⁹ on access to documents was adopted and shortly afterwards implemented by the Council¹⁰ and the Commission.¹¹

The next step towards more transparency came with the Treaty of Amsterdam which provided that decisions need to be taken as openly and closely as *possible* to the citizen (Article 1 TEU). More importantly, under old Article 255 EC (added by the Treaty of Amsterdam) any EU citizen and any natural or legal person residing or having its registered office in a Member State could have access to EP, Council and Commission documents. Access was to be denied for the protection of certain public and private interests to be determined by the Council under the then co-decision procedure. Currently, Article 15 TFEU (which replaced Article 255 EC) requires all the EU organs to conduct their work openly. These Treaty amendments show clearly the political consensus to incorporate the principle of transparency in the EU. What is less clear, however, is the exact status of transparency in the EU legal order due to national divergences on the issue.¹²

The pre-Regulation regime: The Code of Conduct

The main principle enshrined in the Code was that of the “widest possible access to documents”¹³ and the narrowest interpretation of the exceptions, the latter being a corollary of the former. The Code provided for access to be denied where disclosure could undermine the protection of certain public and private interests. Nevertheless, the very wide non-exhaustive list of mandatory exceptions¹⁴ effectively changed the balance from positive rights with

⁷ S. Peers, “From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the EU” in V. Deckmyn (ed.), *Increasing Transparency in the European Union* (Maastricht: EIPA, 2002); A. Tomkins, “Transparency and the Emergence of a European Administrative Law” (1999/2000) 19 Y.E.L. 220; D. Curtin and H. Meijer, “The principle of open government in Schengen and the European Union: democratic retrogression?” (1995) 32 C.M.L. Rev. 391.

⁸ [1993] OJ L 156/5 and [1993] OJ L 166/4.

⁹ 93/730/EC, Code of Conduct concerning public access to Council and Commission documents, [2003] OJ L340/41.

¹⁰ Decision 93/731, [1993] OJ L 340/43.

¹¹ Decision 94/90, [1994] OJ L 340/41.

¹² A. Guggenbuhl, “A Miracle Formula or an Old Powder in New Packaging? Transparency and Openness after Amsterdam” in V. Deckmyn and I. Thomson, *Openness and Transparency in the European Union*, (Maastricht: EIPA, 1998); R.W. Davis, “Public access to community documents: a fundamental human right?” (1999) 3 E.I.O.P. 8.

¹³ *Swenska Journalistförbundet v Council* (T-174/95) EU:T:1998:127 at [110]; *WWF v Commission* (T-105/95) EU:T:1998:127 at [56]; *Interporc (I) v Commission* (T-124/96) EU:T:1998:25 at [49]; *Kuijer (II) v Council* (T-211/00) EU:T:2002:30 at [55]; B. Vesterdorf, “Transparency-not just a vague word” (1999) 22 Fordham Int'l. L. J. 902.

¹⁴ *Carlsen v Council* (T-610/97) EU:T:1998:48 at [48] where the President of the Court ruled that the mandatory exceptions regarding the protection of the public interest were not exhaustive and that an exception relating to the stability of the Community legal order which covers also the legal advice given by the legal service of the institutions existed.

negative exceptions to a text which treated access as the exception. Even after the enactment of the Code there was dissatisfaction with the state of openness. The Council and the Commission, based on a system of secrecy, were reluctant to implement the Code in favour of openness.¹⁵ This led to the consistent refusal of various documents. As a result, the EU Courts handed down several judgments interpreting the Council's and the Commission's decisions denying access under the Code.

The Court of First Instance, now the General Court, held, for instance, that the exceptions must be justified on objective grounds and be applied strictly in a manner that did not defeat the application of the widest possible access.¹⁶ More importantly, the Courts ruled that abstract and general justifications could not be accepted and that the institutions were obliged to state reasons. In doing so, the institutions needed to carry out a concrete and individual assessment before deciding whether or not to release the requested documents.¹⁷ The risk of the public or private interest being undermined must be reasonably foreseeable and not purely hypothetical.¹⁸

In this regard, the Court of First Instance ruled in *Kuijer (II)*¹⁹ that the Council had wrongly applied the exception for 'international relations'. In the Court's view, the Council failed to consider whether there was a risk that the Union's relations with third countries would be prejudiced if the documents in question were released. Instead of making this specific examination, refusal was based on general statements and assumptions rather than on an analysis of factors which effectively may undermine the exception. Yet, in limited circumstances, the requirement of a document-by-document assessment can be abandoned under the "administrative burden rule" whereas the institutions can balance

¹⁵ A. Alemanno and O. Stefan, "Openness at the Court of Justice of the European Union: Toppling a taboo" (2014) 51 C.M.L. Rev. 97; D. Curtin, "Official secrets and the negotiation of international agreements: Is the EU executive unbound?" (2013) 50 C.M.L. Rev. 423; C. Harlow, *Accountability in the European Union*, (Oxford: Oxford University Press, 2002); See also the open letter addressed to the Secretary General of the Council by the European Federation of Journalists dated 30 April 1996 mentioning "grave reservations about the Council's interpretation and practice of the Code of Conduct concerning access to documents".

¹⁶ *WWF v Commission* (T-105/95) EU:T:1997:26 at [55]. This was the first judgment on access to documents rules concerning the Commission. It established that the internal institutional rules on access are capable of conferring rights on citizens as well as imposing obligations upon the Commission. The General Court also ruled on the public interest exception concerning inspections and investigations and held that the documents relating to infringement proceedings according to art. 226 EC Treaty, now art. 258 TFEU, satisfy the conditions that must be met by the Commission in order to rely on the public interest exception pursuant to art. 4(1) of the Code of Conduct. *Netherlands v Council* (C-58/94) EU:C:2003:125; *Netherlands and Van der Wal v Commission* (C-174/98 P & 189/98 P) EU:C:2000:1 at [27] and *Hautala v Council* (C-353/99 P) EU:C:2001:661 at [25]; RW. Davis, "The Court of Justice and the right of public access to Community-held documents" (2000) 25 E.L. Rev. 303.

¹⁷ *Van der Wal v Commission* (T-83/96) EU:T:1998:59 at [43]; *Interporc (I) v Commission* (T-124/96) EU:T:1998:25 at [52]; *Svenska Journalistförbundet v Council* (T-174/95) EU:T:1998:127 at [112] and *Hautala v Council* (C-353/99 P) EU:C:2001:661 at [25].

¹⁸ *Kuijer (II) v Council* (T-211/00) EU:T:2002:30 at [56].

¹⁹ *Kuijer (II) v Council* (T-211/00) EU:T:2002:30.

the work that they will have to bear against the public interest in gaining access. In other words, excessive administrative work caused by a request may allow the institution to derogate from the principle of widest access.²⁰

Regulation 1049/2001 and the relevant case law

The principle of transparency was established formally in the EU legal order with the adoption of Regulation 1049/2001 which governs, at the time of writing, the fundamental²¹ right of citizens and residents in the EU to access, in principle, all the documents drawn or held by the EP, Council and Commission.²² Pursuant to Article 2 of the Regulation, all documents *held* by the EU organs are currently subject to the access rules. This marked a significant positive change to the pre-Regulation regime. As already explained above, under the Code of Conduct, requests for documents held by the institutions but authored by third parties and Member States needed to be directed to them since they were not covered by the access rules.²³

The adoption of the Regulation was seen as a real triumph for the advocates of transparency in the EU.²⁴ For the first time in the history of European integration, EU law set out the binding requirements for securing the democratic right of an informed citizenry. This Regulation reflects the overall intention, already specified in the second subparagraph of Article 1 TEU, to mark a new stage in the process of creating an even closer Union among the peoples of Europe, in which decisions are taken as openly and as closely as possible to the citizen. Similarly, Recital 2 of the Regulation's Preamble

²⁰ *Hautala v Council* (C-353/99 P) EU:C:2001:661 at [30]; *Hautala v Council* (T-14/98) EU:T:1999:157 at [86]; *Kuijter v Council* (T-188/98) EU:T:2000:101 at [55-56]; *Kuijter (II) v Council* (T-211/00) EU:T:2002:30 at [57]. See e.g. J. Helliskoski and P. Leino, "Darkness at the Break of Noon: The Case Law on Regulation No. 1049/2001 on Access to Documents" (2007) 43 C.M.L. Rev. 735; A. Flanagan, "EU Freedom of Information: Determining where the Interest Lies" (2007) 13 E.P.L. 595.

²¹ Legal scholars (and applicants before the Courts) have repeatedly argued on the fundamental nature of the access right. See for example D. Curtin, "Citizens' fundamental right of access to EU information: an evolving digital passepartout?" (2000) 37 C.M.L. Rev. 7; M. Broberg, "Access to Documents: A General Principle of Community Law", (2002) 27 E.L. Rev. This discourse constitutes now a discussion for the past. Post Lisbon, Article 6 TEU recognizes the Charter of Fundamental Rights as legally binding, granting it the same legal value as the Treaties. The Charter includes in Article 42 a right of access to documents. In addition Article 15 TFEU which is the equivalent of the previous Article 255 EC Treaty is significantly widened. For example it covers the Union institutions, bodies, offices and agencies and also the Court of Justice, the European Central Bank and the European Investment Bank are covered by this provision for their administrative tasks.

²² Although in principle the beneficiaries of the right of access to documents are EU citizens and residents, art. 2(2) of the Regulation grants discretion to the EU institutions bound by it to grant access to any natural or legal person not residing or not having its registered office in a MS. The institutions responded positively to this option. See Decision 2001/840 of the Council ([2001] OJ L313/40, Decision 2001/937 of the Commission ([2001] OJ L 345/94 and the Decision of the EP ([2001] OJ L 374 /I). Additionally, the application of the Regulation was extended, by separate legal measures, to all the EU institutions, bodies, offices and agencies.

²³ Peers, see fn. 3.

²⁴ I. Harden, "Citizenship and Information", (2001) 7 E.P.L. 165.

clarifies that there is a direct causal link between the fundamental right of EU citizens and residents to have access to information with the democratic nature of the institutions. This formal ability of the public to participate, influence and monitor the decision-making process intended to increase the state of accountability in the EU as well as to secure open performance in the decision-making process. Seen from this perspective, access to documents is considered to be an essential accountability component, since without information on what basis decisions are being taken, and by whom, it is impossible for the various accountability forums to hold the actors to account. Yet, there are a number of ambiguous provisions within the Regulation which highlight the level of political disagreement over the exact status of transparency in the EU legal order. It is this ambiguity that imposes an extra duty upon the EU Courts to establish the right balance amongst the various interests at stake.

In April 2008, the Commission published a legislative proposal to recast the Regulation.²⁵ Following the publication of the Commission's proposal, the EP adopted a number of amendments and, after the Parliament's requests, the Commission adopted a later proposal.²⁶ On 15 December 2011, the EP approved the proposal.²⁷ Yet, the amendment process has not been progressed in the Council. The weak points of the current regime, as already explained above, stem predominantly from the broad exceptions enshrined in the Regulation. Thus, in the amendment process, emphasis must be based upon the task of clarifying the exceptions. Rather regrettably, the procedure to recast the current access regime provides evidence to the contrary and the proposal itself is far from securing transparency.

In particular, Article 2(6) of the Commission's proposal reduces dramatically the current standards since it would leave outside the scope of the Regulation documents relating to individual decisions and investigations until the decision has been taken and the investigation has been closed or the act has become definitive. In addition, "documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public even after the closure of the investigation". At present, Article 4(2) of the Regulation provides that the disclosure of documents which would undermine the protection of inspections, investigations and audits shall be refused, unless there is an overriding public interest following disclosure. If the proposed provision is adopted this would constitute a step backwards in terms of the existing *status quo*, since this provision would not be protected by an overriding public interest in disclosure.

²⁵ Proposal for a Regulation regarding public access to European Parliament, Council and Commission documents, COM (2008) 229 final (April 30, 2008), 2008/0090(COD).

²⁶ Proposal for a Regulation regarding public access to European Parliament, Council and Commission documents, COM (2011) 137 final (March 30, 2011), 2011/0073(COD).

²⁷ For a general criticism of the Commission's proposal see N Diamandouros, "Contribution of the European Ombudsman to the public hearing on the revision of Regulation 1049/2001 on public access to documents", speech delivered in the EP on 2 June 2008.

There are four types of exceptions provided by the Regulation: mandatory, “discretionary”, the protection of the decision-making process and, finally, documents originating from third parties and Member States. The first category of exceptions (Article 4(1) of the Regulation) precludes access to any of the documents falling within it and calls for no balancing of interests at stake. If the institutions can prove that the documents fall into this category, refusal is automatically justified.²⁸ The second category, set out in Article 4(2), is not really discretionary, since uses the same mandatory language (“shall refuse”) as the exceptions in Article 4(1), but is subject to a public interest override in favour of disclosure.

Thirdly, the decision-making exception in Article 4(3) is the equivalent of the confidentiality exception under the Code of Conduct. However, the test in the Regulation sets a higher threshold for non-disclosure than under the Code of Conduct. Specifically, it requires that the disclosure “significantly undermines” the decision-making of the EU institutions. Accordingly, the balance is tipped towards disclosure. Fourthly, with regards to documents drafted by third parties and Member States, Article 4(4) and (5) requires the institution to consult the third party for determining whether the exceptions of Article 4(1) and (2) are applicable, unless it is clear that the document shall or shall not be disclosed.

The pre-Regulation case law has, to a large extent, been incorporated into this Regulation and the interpretation of the old rules is still applicable unless clearly stated otherwise.²⁹ This is justified by Recital 3 of the Regulation’s Preamble, which states that the Regulation “consolidates the initiatives which the institutions have already taken”. Essentially, the jurisprudence towards the right of access has developed two approaches. The first one was described as “marginal review”, whereas the second was called as the “foreseeability standard”.³⁰ The former approach relates to the fact that the institutions exercise wide discretion when they apply the exception³¹ and in consequence

²⁸ H. Kranenborg, “Access to documents and data protection in the European Union: On the public nature of personal data” (2008) 45 C.M.L. Rev. 1079; *Sison v Council* (T-110/03, T-150/03 and T-405/03) EU:T:2005:143; *Kuijer (II) v Council* (T-211/00) EU:T:2002:30; *Hautala v Council* (T-14/98) EU:T:1999:157; *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P & C-532/07 P) EU:C:2010:541; *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) EU:C:2010:376; *Access Info Europe v Commission* (T-851/16) EU:T:2018:69; and *Access Info Europe v Commission* (T-852/16) EU:T:2018:71; *Access Info Europe v Commission* (T-851/16) EU:T:2018:69; and *Client Earth v Commission* (T-644/16) EU:T:2018:429.

²⁹ Peers, see fn. 3; H. Kranenborg, “Is it Time to Revise the European Regulation on Public Access to Documents?” (2006) 12 E.P.L., 251; *Franchet and Byk v Commission* (T-391/03 & T-70/04) ECLI:EU:T:2006:190 at [82] and [88] whereas the court applied and further developed the prior jurisprudence concerning the exceptions of the access rules.

³⁰ D. Adamski, “How wide is “the widest possible”? Judicial interpretation of the exceptions to the right of access to official documents revisited”, (2009) 46 C.M.L. Rev. 521.

³¹ *Kuijer (II) v Council* (T-211/00) EU:T:2002:30 at [53]: ‘When the Council decides whether the public interest may be undermined by releasing a document, it exercises a discretion which is among the political responsibilities conferred on it by provisions of the Treaties’; *Sison v Council* (C-266/05 P) EU:C:2007:75 [15]: ‘in areas covered by the mandatory

judicial review is significantly restrained. The latter confirms the requirement for the widest possible access so long as the risk to harm the protected interest is not merely hypothetical.

Despite the careful and consistent emphasis of the EU Courts in opening up the overall decision-making process, there is a parallel development of a set of general presumptions against openness (see below), which reveals the existence of a paradox within that line of case law. Arguably, general presumptions defeat the very purpose of the widest access which is emphasised categorically during the past 20 years in the case law.³² More fundamentally, this approach reveals that the EU Courts have taken a rather limited line on openness which necessarily contributes to the on-going debate about the lack of accountability in the EU. To substantiate this, the application of the exceptions regarding legislative, administrative and judicial documents, as per settled case law, is discussed below.

Legislative Documents

In *Turco*,³³ the applicant requested access to an opinion of the Council's legal service relating to a proposal for a Council Directive laying down the minimum standards for the reception of applicants for asylum in Member States.³⁴ The General Court, in keeping with prior case law, reiterated that denial of access must be based on a concrete and individual examination. But nevertheless, the Council's generality in its refusal was this time justified by the fact that giving additional information would deprive the exception relied upon of its effect.³⁵ The rationale behind the legal advice exception, according to the Court, is to avoid uncertainty by raising doubts over the legality of EU legislation,³⁶ to secure the independence of the legal service and to protect the interest of the institution to receive independent and frank legal advice.³⁷ In essence, the Court ruled that the legal advice exception should escape the well-established duty, incumbent on institutions, to carry out the case-by-case assessment and that the public interest override will never apply to such advice. In other words, it would be impossible to imagine a case in which the override would ever be applied in practice as regards legal advice.

In relation to legislative matters, this case law can no longer be considered as good law. The Court of Justice, in the joined cases of *Sweden and Turco v Council*,³⁸ invalidated the General Court's reasoning, upheld the appeal and

exceptions to public access to documents, provided for in Art. 4(1) (a) of Regulation 1049/2001, the institutions enjoy a wide discretion'.

³² See *LPN and Finland v Commission* (C-514/11 P) EU:C:2013:738.

³³ *Turco v Council* (T-84/03) EU:T:2004:339.

³⁴ *Turco v Council* (T-84/03) EU:T:2004:339 at [4].

³⁵ *Turco v Council* (T-84/03) EU:T:2004:339 at [74].

³⁶ *Turco v Council* (T-84/03) EU:T:2004:339 at [78].

³⁷ *Turco v Council* (T-84/03) EU:T:2004:339 at [79].

³⁸ *Sweden and Turco v Council* (C-39/05 P and C-52/05 P) EU:C:2008:374. See also A. Arnall, "Joined Cases C-39/05 P & C-52/05 P, Sweden and Turco v. Council, judgment of the Grand Chamber of 1 July 2008" (2009) 46 C.M.L. Rev. 1219; D. Adamski, "Approximating a

ruled that legal advice given in the remit of legislative procedures must be released. The judgment addressed how institutions should deal with disclosure requests relating to legal advice. It was held that when institutions are asked to disclose such a document, they must carry out a specific three-stage procedure that corresponds to the three criteria set out by the Court.³⁹ Firstly, the institution must consider and satisfy itself that the document does relate to legal advice and if so to examine whether partial access can be given.⁴⁰ Secondly, the institution is required to consider whether disclosure of any parts of the document would undermine the protection of the advice.⁴¹ The Court noted that the exception must be understood in the light of the purpose of the Regulation. Under this, the exception “must be construed as aiming to protect an institution’s interest in seeking legal advice and receiving frank, objective and comprehensive advice”.⁴² Finally, it is incumbent on the institution to balance the interest in non-disclosure against any possible countervailing interest, bearing in mind the overall purpose to secure the widest possible access, giving a reasoned judgment.⁴³

What is most important for the interpretation given in *Turco* is the finding that the General Court erred in law in concluding that the *raison d’être* of the legal advice exception is not to avoid fuelling doubts over the legality of legislation. According to the wording of the Court of Justice, “it is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole”.⁴⁴ Therefore, while the judgment increases public access as regards legal advice, it also more fundamentally places the access rules next to the principles of democracy and civil participation in the Union’s overall decision-making process. It does so in a way which highlights the ability of the citizenry to have access to information as one of Union’s fundamental credentials.

By upholding the appeal, the Court of Justice reintroduced the cornerstone of the access regime and its relationship with the state of accountability and legitimacy in the EU. The ability of the citizenry to assess the impact, comment upon, influence the development of policies and finally hold the “government” accountable is highlighted throughout the judgment. It follows clearly from the reasoning of the Court that the EU is democratic in part because of the ability of the citizens to stay informed. Similarly and in contrast with what was ruled by the General Court, the overriding public interest pressing for disclosure of the legal advice needs to be no different from the principles of openness, transparency, democracy and civil participation in the decision-making process which already underlie the Regulation.⁴⁵ The last

workable compromise on access to official documents: The 2011 developments in the European courts” (2012) 49 C.M.L. Rev. 521.

³⁹ *Sweden and Turco v Council* (C-39/05P and C-52/05P) EU:C:2008:374 at [37].

⁴⁰ *Sweden and Turco v Council* (C-39/05P and C-52/05P) EU:C:2008:374 at [38].

⁴¹ *Sweden and Turco v Council* (C-39/05P and C-52/05P) EU:C:2008:374 at [40].

⁴² *Sweden and Turco v Council* (C-39/05P and C-52/05P) EU:C:2008:374 at [42].

⁴³ *Sweden and Turco v Council* (C-39/05P and C-52/05P) EU:C:2008:374 at [44].

⁴⁴ *Sweden and Turco v Council* (C-39/05P and C-52/05P) EU:C:2008:374 at [59].

⁴⁵ *Sweden and Turco v Council* (C-39/05P and C-52/05P) EU:C:2008:374 at [74].

limb of the delicate balancing exercise is perhaps the greatest contribution of the Court in terms of accountability since it prioritises access amongst the countervailing interests at stake.

Similarly, the validity of wider access in legislative matters was confirmed in *Access info*.⁴⁶ The General Court ruled that the Council erred not to disclose the identity of countries taking positions on the reform of the EU's access to documents rules. In light of this, the Court stated that the Council had "in no way demonstrated"⁴⁷ how publication of the country names would "seriously undermine its decision-making process".⁴⁸ The Court further found that "if citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process ... and have access to all relevant information".⁴⁹ The Court of Justice confirmed this approach and rejected the appeal lodged by the Council.⁵⁰ The Council, however, in practice continues not to publish the names of the national delegations and full access is confined to a successful request under the Regulation. More recently, the Court has ruled that the principle of wider access to documents in the legislative process also applies to documents drawn up before that process even formally starts, in the context of an impact assessment for the purposes of a planned legislative proposal.⁵¹ Moreover, the General Court has ruled that the principle of wider access in legislative procedures rules out any general presumption relating to trilogue documents.⁵²

The approach taken in *Turco* was indeed promising in terms of transparency.⁵³ It clearly provided the foundations to disclose legal advice given also in the remit of the executive action of the EU institutions. This was upheld by the General Court and confirmed by the Court of Justice (as regards legal advice relating to international negotiations) in *In't Veld*.⁵⁴

The Paradox of Turco: the "presumptions" doctrine

While *Turco* was certainly a very progressive development as far as legislative documents were concerned, this judicial gift came with hidden limitations – rather like the legendary Trojan Horse. In particular, the judgment created the doctrine of "general presumptions" as a ground for refusing access to documents without individual consideration. According to the Court, "[i]t is in principle, open to the Council to base its decisions [...] on general presumptions which apply to certain categories of documents, as

⁴⁶ *Access Info Europe v Council* (T-233/09) EU:T:2011:105.

⁴⁷ *Access Info Europe v Council* (T-233/09) EU:T:2011:105 at [83].

⁴⁸ *Access Info Europe v Council* (T-233/09) EU:T:2011:105 at [84].

⁴⁹ *Access Info Europe v Council* (T-233/09) EU:T:2011:105 at [69].

⁵⁰ *Council v Access Info Europe* (C-280/11 P) EU:C:2013:671.

⁵¹ *ClientEarth v Commission* (C-57/16 P) EU:C:2018:660.

⁵² *De Capitani v EP* (C-540/15) ECLI:EU:T:2018:167.

⁵³ Adamski, see fn. 27.

⁵⁴ *Sophie In't Veld v Commission* (T-301/10) EU:T:2013:135; *Council v Sophie In't Veld* (C-350/12 P) EU:C:2014:239.

considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature.”⁵⁵

In effect, the Court ruled that the Council, and arguably by analogy all the other institutions, can deny access based on general considerations as opposed to the previously well-established duty for a specific and detailed examination of each request. After the *Turco* ruling, there was every possibility that the institutions, the Commission in particular, would rely on general considerations in order to avoid carrying out a concrete appraisal of the requested documents. The Court, with great respect, set the foundations to depart from the principle of transparency and to disregard almost two decades of jurisprudence. Indeed, the later developments, examined further below, provide with sufficient evidence to question the validity of the early finding that the judgment was spectacularly progressive.

Administrative documents: the end of the one by one examination?

Despite the adoption of the Regulation, the state of transparency in the EU is still problematic. The institutions continuously rely on a culture of secrecy and take every opportunity to deny access. They are bolstered not only by the presumptions doctrine (as discussed below) but also by an ‘administrative burdens’ exception, which was also developed by the Courts. In *Verein für Konsumenteninformation*,⁵⁶ a consumers’ organization had sought access to the Commission’s administrative file containing 47,000 pages. The Commission refused access to the entire file on the grounds that partial access “would have represented an excessive and disproportionate amount of work for it”.⁵⁷ In essence, the Commission denied access without even looking at the file, not even attempting to browse through the documents. But assume for a while that the Commission was right and the request was particularly burdensome. Assume further that the request could even paralyse the proper functioning of the institution. Should it result in the public being deprived from the fundamental right of access in such generic terms? Can it be considered as acceptable for the institutions to reduce the standards of transparency without invoking the exceptions provided by the Regulation?

The Regulation does not provide in any provision for the requirements of concrete and individual assessment to be abandoned under any circumstances. While Article 6(3) provides for an informal consultation aiming to find a fair solution, Article 7(3) provides that the time limit for handling an application can, under certain circumstances, be extended. Similarly, the Court noted that in the absence of a fair solution mentioned in Article 6(3), the Regulation provides no exception similar to the one developed through the jurisprudence of the Courts relating to the administrative burden.⁵⁸ The Court moved on to note that the principle of proportionality may justify refusal of a concrete and individual examination to avoid cases where a manifestly

⁵⁵ *Sweden and Turco v Council* (C-39/05P and C-52/05P) EU:C:2008:374 at [50].

⁵⁶ *Verein für Konsumenteninformation v Commission* (T-2/03) EU:T:2005:125.

⁵⁷ *Verein für Konsumenteninformation v Commission* (T-2/03) EU:T:2005:125 at [20].

⁵⁸ *Verein für Konsumenteninformation v Commission* (T-2/03) EU:T:2005:125 at [96].

unreasonable number of documents is requested which could result in paralysis of the proper functioning of the institution.⁵⁹

According to the Court, Article 6(3) of the Regulation reflects the possibility that where a very large number of documents is requested the institution can “reconcile the interests of the applicant with those of good administration”.⁶⁰ As a result, there can be cases that require no individual examination. The Court observed that the possibility of non-concrete assessment must satisfy four requirements:

- i) The administrative burden entailed by concrete and individual examination must be heavy and exceed the limits of what may be reasonably required.
- ii) The burden of proof rests within the institution relying on its unreasonableness.
- iii) The institution must consult with the applicant in order to ascertain his interest and consider how it might adopt a measure less onerous than a concrete and individual examination.
- iv) The institution must prioritize the most favourable option for the applicant’s right of access.⁶¹

With great respect to the judgment, the validity of the criteria quoted above can be questioned. The requirements lack proper foundation in the legislation. Had the legislature wanted to incorporate the pre-Regulation case law on administrative burden it would have had every opportunity to do so. Yet, the legislature did not do so because they could hardly see how this restriction could fit with the principle of the widest possible access and with the corollary fundamental legal standard to interpret the exceptions narrowly.

The EU Courts developed further the restriction of the administrative burden rule through the “general presumptions” of non-disclosure. The latest tendency is that careful scrutiny of the requested documents is no longer necessary for certain categories of documents since similar considerations justifying application of one or more of the exceptions to the right of access are likely to apply to documents of the same nature. In this regard, the Court of Justice in *TGI*⁶² recognised the existence of a general presumption against disclosure with regards to state aid documents in the administrative file.⁶³ In doing so, the Court established that state aid documents are essentially exempted from the document-by-document appraisal unless there is a higher

⁵⁹ *Verein für Konsumenteninformation v Commission* (T-2/03) EU:T:2005:125 at [101].

⁶⁰ *Verein für Konsumenteninformation v Commission* (T-2/03) EU:T:2005:125 at [101].

⁶¹ *Verein für Konsumenteninformation v Commission* (T-2/03) EU:T:2005:125 at [112-115].

⁶² *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) ECLI:EU:C:2010:376; see also: *Commission v Agrofert Holding a.s.* (C-477/10 P) ECLI:EU:C:2012:394; *Commission v Editions Odile Jacob SAS* (C-404/10 P) ECLI:EU:C:2012:393; *Guido Strack v Commission* (T-392/07) ECLI:EU:T:2013:8.

⁶³ *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) EU:C:2010:376 at [61].

public interest justifying disclosure.⁶⁴ But nevertheless, the Court has neither accepted nor explained any valid grounds that may be considered as satisfactory in terms of a higher public interest override. The Court has taken a similar approach to merger control, and to competition proceedings more generally.⁶⁵

The general presumption was also upheld in *LPN*⁶⁶ in relation to infringement proceedings.⁶⁷ On appeal, the applicants, LPN and Finland, argued that the Commission denied access without carrying out, in violation of settled case law, a concrete and individual assessment of the requested documents.⁶⁸ The Court ruled “... that it can be *presumed* (emphasis added) that the disclosure of the documents concerning the infringement proceedings during the pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001”.⁶⁹

The presumptions case law is in direct contrast with the Treaty framework, in particular with the requirements to take decisions as openly as possible pursuant to Article 1 TEU as well as with the overall wording of the Regulation. The Regulation provides no basis for the establishment of general presumptions. The Court of Justice’s position on presumptions imposes significant constitutional ramifications on the fundamental aspect of the access right and incorporates limitations without the required level of explanation and clarity. The *LPN* judgment considered that the interests of a non-governmental organisation with the aim of protecting the environment cannot be considered as particularly pertinent justifying disclosure. That makes one wonder if such an override cannot be established in an area where possible violations of EU law by Member States might take place then remains difficult to conceive a scenario where the override would ever be accepted by the Court. In essence, *LPN* treats in a rather paradoxical way a respectable non-governmental organisation as a mere “busybody” unable to invoke successfully the override.

Judicial documents

Equally restrictive is the approach of the Court in relation to its own documents. Currently, the Court may base its decisions on the grounds of general presumptions and rule that disclosure of judicial documents is

⁶⁴ *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) EU:C:2010:376 at [62].

⁶⁵ *Commission v EnBW* (C-365/12 P) EU:C:2014:112. See *Edeka-Handelsgesellschaft Hessenring mbH, v Commission* (T-611/15) ECLI:EU:T:2018:63, where the general presumption applies to a single document constituting merely a table of contents of a file.

⁶⁶ *LPN and Finland v Commission* (C-514/11) EU:C:2013:738. This ruling applies by analogy to the EU ‘pilot procedure’ relating to infringements: *Sweden v Commission* (C-562/14 P) EU:C:2017:356.

⁶⁷ *LPN v Commission* (T-29/08) EU:T:2011:448 at [126].

⁶⁸ *LPN and Finland v Commission* (C-514/11) EU:C:2013:738 [35].

⁶⁹ *LPN and Finland v Commission* (C-514/11) EU:C:2013:738 at [65].

capable of causing harm, in a foreseeable way, to the outcome of Court proceedings. In *API*,⁷⁰ a non-profit-making organisation of foreign journalists made a request to have access to the Commission's submissions regarding, *inter alia*, a number of ongoing cases and one which, although closed, was related to an open case.⁷¹ The General Court ruled that the Commission could issue a blanket refusal in relation to all documents so long as the oral argument in the Court proceedings had not yet been presented. The rationale behind this is to protect the Court proceedings from all external pressure until the case reaches the final stage of the hearing.⁷²

With great respect, the Court's ruling was wrong to find that the Commission was in a position to refuse access to the whole category of judicial documents without following a concrete and individual examination and without stating detailed reasons. The blanket refusal accepted by the Court seems to misunderstand the rationale of the access to documents regime.⁷³ More importantly, it leaves the access to documents rules at a vulnerable stage. As already explained above, the mere fact that a document referred to in the application for access concerns an interest protected by an exception does not justify application of that exception. The exceptions are applicable only if the institution had previously assessed whether access would specifically and actually undermine the protected interest and, if so, there was no overriding public interest under Article 4(2) and (3). The risk of the protected interest being undermined must not be purely hypothetical. Consequently, the examination which the institution must undertake needs to be carried out in a concrete manner and be apparent from the reasons given. Only a concrete and individual examination, as opposed to an abstract, overall examination, would enable the institution to assess the possibility of granting the applicant partial access pursuant to Article 4(6) of the Regulation. The institution's obligation to undertake this type of assessment is applicable to all the exceptions found in paragraphs 1 to 3 of Article 4.

On appeal, the Court concluded that access to judicial documents can be denied on the basis of general presumptions since considerations of a similar kind are likely to apply to documents of the same nature.⁷⁴ The Court confirmed that judicial documents are covered by a presumption against openness until the hearing date, and that disclosure of the pleadings would

⁷⁰ *Association de la presse internationale a.s.b.l. (API) v Commission* (T-36/04) EU:T:2007:258.

⁷¹ *Honeywell International v Commission* (T-209/01) EU:T:2005:455 and *General Electric v Commission* (T-210/01) EU:T:2005:456; *Airtours v Commission* (T-342/99) EU:T:2002:146; *Commission v Austria* (C-203/03) EU:C:2005:76; *Commission v United Kingdom* (C-466/98) EU:C:2002:624; *Commission v Denmark* (C-467/98) EU:C:2002:625; *Commission v Finland* (C-469/98) EU:C:2002:627; *Commission v Belgium* (C-471/98) EU:C:2002:628; *Commission v Luxembourg* (C-472/98) EU:C:2002:629; *Commission v Austria* (C-475/98) EU:C:2002:630 and *Commission v Germany* (the *Open Skies* cases), (C-476/98) EU:C:2002:631.

⁷² *Association de la presse internationale a.s.b.l. (API) v Commission* (T-36/04) EU:T:2007:258 at [99].

⁷³ P. Leino, "Just a little sunshine in the rain: The 2010 case law of the European Court of Justice on access to documents" (2011) 48 C.M.L. Rev. 1215.

⁷⁴ *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P & C-532/07 P) EU:C:2010:541 at [74].

undermine their protection, covered by the exception of the second indent of Article 4(2), while those proceedings remain pending.⁷⁵ In consequence, the Commission bears no obligation “to carry out a concrete assessment of each document requested in order to determine whether, given the specific content of that document, its disclosure would undermine the Court proceedings to which it relates”.⁷⁶

With this judgment, the Court of Justice significantly curtailed the already limited public access as regards Court proceedings. Post *API*, the burden of proof to rebut the presumption of non-disclosure rests on the applicant, whereas previously the institutions had the burden to prove that concrete and individual examination was not necessary.⁷⁷ This is deeply unsatisfactory for the state of transparency and in conjunction with the finding that the overriding public interest can only be taken into account as long as it is particularly pertinent effectively leaves with no access right as regards judicial documents.⁷⁸ Overall, the decision of the Court is problematic for two reasons. Firstly, it decreases dramatically public access as regards judicial documents, until a certain point and while the proceedings remain open, and sets the default position to non-disclosure. In terms of transparency, this is a significant step backwards. Applicants can no longer secure access for judicial documents unless they rebut, rather unlikely, the presumption of not disclosure. Secondly and more fundamentally, requires the applicant, rather illogically, to discharge the burden of the presumption, even though the plaintiff has no sight of the documents.

While there is a clear strand in the case law about the general presumptions, still there are cases in which the EU Courts have rejected the idea of the presumption and pointed out to the opposite direction on the grounds that disclosure could not distort the decision-making process.⁷⁹ Notably, the Court of Justice has confirmed in *Breyer*⁸⁰ that while the presumption of refusal of Court documents held by the Commission also applies to such documents submitted by Member States, this presumption still only applies while the Court proceedings remain pending. Also, the issue of general presumptions does not arise in relation to Commission opinions on Member States’ draft technical regulations, since the ‘investigations’ exception to the transparency rules does not apply to such documents.⁸¹ Furthermore, the general

⁷⁵ *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P & C-532/07 P) EU:C:2010:541 at [94].

⁷⁶ *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P & C-532/07 P) EU:C:2010:541 at [104].

⁷⁷ *Verein für Konsumenteninformation v Commission* (T-2/03) EU:T:2005:125.

⁷⁸ *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P & C-532/07 P) EU:C:2010:541 at [157].

⁷⁹ *Sweden v Commission and MyTravel Group plc.* (C-506/08 P) EU:C:2011:496; *Batchelor v Commission* (T-250/08) EU:T:2011:236; *NLG v Commission* (T-109 and 444/05) EU:T:2011:235.

⁸⁰ *Patrick Breyer v Commission* (T-188/12) EU:T:2015:124; *Commission v Patrick Breyer* C-213/15 P EU:C:2017:563.

⁸¹ *Carl Schlyter v Commission* (T-402/12) EU:T:2015:209 at [90]; upheld by *France v Carl Schlyter* (C-331/15 P) EU:C:2017:639. See similarly *France v Commission* (T-344/15) ECLI:EU:T:2017:250.

presumption applying to infringement proceedings does not apply to general studies on national application of EU law which have not yet been used to trigger such proceedings.⁸² There is no general presumption as regards the information in the requests for quotation drawn up by the contracting authority under a framework procurement contract.⁸³ Nor is there a general presumption for the documents submitted for a marketing authorization application for a medical product, in particular clinical study reports.⁸⁴ Similarly, there is no general presumption relating to the procedure for authorization of the use of chemicals.⁸⁵ Finally, as noted already, no general presumption applies to documents drawn up in the context of an impact assessment for the purposes of a planned legislative proposal.⁸⁶

Nevertheless, general considerations leading to the presumption of non-disclosure are well-established and very difficult to rebut.⁸⁷ In practice, the nature of the requested documents gives rise to different judicial treatment. As already explained above, while the case law significantly increased public access as regards legislative documents it has set the default position as regards many non-legislative documents to non-disclosure. As a result, the presumptions case law reveals the existence of a paradox. We saw the Court confirm categorically over the last 20 years that openness secures public oversight of the EU's decision-making, describing it as one of the fundamental credentials of the Union's democratic society. Yet, the case law significantly decreases public access and leaves intact the possibility of the EU institutions to refuse access to the entire administrative file as regards particular categories of documents without even looking at them.

Conclusion

The Treaty of Lisbon attempted to rectify the transparency inadequacies by incorporating a generic obligation upon all the EU organs to function openly. In doing so, the Treaty has reinforced that, without access to the relevant information, citizens are unable to participate in the decision-making process, to monitor and finally to hold "governmental" actors accountable. In this way, transparency enhances awareness, illustrates understanding of the ultimate objectives that the decision-making processes aim to achieve and finally grants legitimacy upon the EU. Similarly, the transparency Regulation has

⁸² *ClientEarth v Commission* (C-612/13 P) EU:C:2015:486.

⁸³ *Evropaïki Dynamiki v Commission* (C-136/15) ECLI:EU:T:2017:915.

⁸⁴ *Pari Pharma v EMA* (T-235/15) ECLI:EU:T:2018:65; *PTC v EMA* (T-718/15) ECLI:EU:T:2018:66; *MSD and Intervet v EMA* (T-529/15) ECLI:EU:T:2018:67; *Amicus Therapeutics v EMA* (T-33/17) EU:T:2018:595.

⁸⁵ *Deza v ECHA*, T-189/14, EU:T:2017:4.

⁸⁶ *ClientEarth v Commission* (C-57/16 P) EU:C:2018:660.

⁸⁷ *LPN and Finland v Commission* EU:C:2013:738; *Dennekamp v Parliament*, T-82/09, EU:T:2011:688; *Sweden and Others v API and Commission*, EU:C:2010:541; *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376.

improved the position of the access regime in several aspects. Notably, it has codified the exceptions and confirmed the widest possible access.

The judiciary has also contributed, to a greater or lesser extent, to the development of the access right. It has done so in a more limited way as regards administrative and judicial documents. The extent to which the jurisprudence acknowledges the existence of general presumptions is fundamentally mistaken, lacking any support in the legislation or the Treaties. As a result of this case law, the institutions can now offer a wide justification often relating to the entire administrative file and provide no evidence that they considered less onerous ways of dealing with the request. This is especially true in the light of the significant number of cases involving general presumptions as regards the administrative functions of the institutions.⁸⁸ In practice, the presumptions case law establishes a clear distinction between legislative and non-legislative documents and confirms, contrary to the wording of the Regulation, the widest possible access with regards to the former category only. For a Union which is constantly struggling with allegations about its democratic deficit, perhaps a more balanced judicial attitude in respecting the rule of law as well as the transparency standards mandated by the legislature would be more appropriate.

⁸⁸ *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) EU:C:2010:376; *Commission v Agrofert Holding a.s.*, (C-477/10 P) EU:C:2012:394; *LPN and Finland v Commission* (C-514/11 P) EU:C:2013:738.